Supreme Court, U.S.
FILED
04-535 OCT 18 2004
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

LAURA ESTHER GONZALEZ-HERNANDEZ

and

JULIAN MONCADA-GONZALEZ,

Petitioners,

v.

JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. VAIL
Counsel of Record for Petitioners
University of Houston Law Center
Clinical Legal Education
100 Law Center, TUII 56
Houston, Texas 77204-6060
713-743-2094

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether, when the historical facts upon which an alien bases her asylum application are undisputed and an asylum applicant is credible, a court of appeals reviews the questions of nexus to and presence of political opinion and imputed opinion for substantial evidence, or under a less deferential mixed question of law and fact standard?

2. Whether an applicant for asylum must adduce direct evidence that she was persecuted on account of an imputed political opinion, or circumstantial evidence is sufficient to meet her burden of proof; and if circumstantial evidence is enough, then, whether the standard of proof the applicant is subject to changes when a petition for review is filed with a circuit court of appeals, or is a substantive part of an asylum claim?

3. Whether on the following undisputed facts any reasonable fact finder could fail to find that petitioner showed some circumstantial evidence of her persecutor's motivation: when petitioner refused to manufacture clothing for a paramilitary group, which she opposes, that group's members accused her of not wanting to help the group; immediately afterwards those members were arrested; the next day petitioner, her mother, and her son were threatened with death because of those arrests, and she was accused of informing the police and of turning her back on the group; the morning after the threats the petitioner's aunt was murdered on an empty street while walking beside petitioner's mother?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	v
Citation of the Agency and Court Orders and Opinions	1
Statement of Jurisdiction	1
Applicable Law	2
Statement of the Case	4
A. Jurisdiction Below	4
B. Credibility	4
C. The Actors	4
D. The Acts	5
E. The Adjudications	6
Reasons for Granting the Petition For Writ of Certiorari	7
A. Standard of Review	7
B. Burden of Proof	10
C. Substantial Evidence	13
Conclusion	15
Appendix	
A. Fifth Circuit Denial of Petition for Review	App. 1
B. Board of Immigration Appeals Decision	App. 5
C. Board of Immigration Appeals Decision	App. 6
D. Immigration Judge Decision	App. 7

TABLE OF CONTENTS – Continued

Page

E. Fifth Circuit Order Denying Rehearing .....App. 25

F. Petitioner's Affidavit .....App. 26

TABLE OF AUTHORITIES

Page

CASES

Adhiyappa v. INS, 58 F.3d 261 (6th Cir. 1995) 9

Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359 (1998) 14

Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) 11

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 10

INS v. Elias-Zacarias, 502 U.S. 478 (1992) 10

Matthews v. Eldridge, 424 U.S. 319 (1976) 13

Mejia v. Ashcroft, 298 F.3d 873 (9th Cir. 2002) 10

Mikhael v. INS, 115 F.3d 299 (5th Cir. 1997) 8

Ornelas v. United States, 517 U.S. 690 (1996) 7, 8

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 8

Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15 (2000) 11

Secaida-Rosales v. INS, 331 F.3d 297 (2nd Cir. 2003) 8

STATUTES

8 U.S.C. § 1101(a)(42)(A) 2

8 U.S.C. § 1158(b)(1) 2

8 U.S.C. § 1252(a)(1) 2, 4

8 U.S.C. § 1252(b)(4)(A), (B) 3, 11

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2350(a) 2

TABLE OF AUTHORITIES – Continued

Page

INA § 101(a)(42)(A) 2

INA § 208(b)(1) 2

INA § 242(a)(1) 2

INA § 242(b)(4)(A), (B) 3, 11

REGULATIONS

8 C.F.R. § 208.13(a) 3, 14

8 C.F.R. § 208.13(b) 3

8 C.F.R. § 1003.2(e) 9

8 C.F.R. § 1208.13(a) 3, 14

8 C.F.R. § 1208.13(b) 3

BIA Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (2002) 9

OTHER MATERIALS

American Bar Association Commission on Immigration Policy, Practice and Pro Bono, *Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms* (October 2003) 9

PETITION FOR WRIT OF CERTIORARI

Petitioners, Laura Esther Gonzalez-Hernandez and her minor son, Julian David Moncada-Gonzalez, respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit issued on May 25, 2004. App. 1.

CITATION OF THE AGENCY AND COURT ORDERS AND OPINIONS

The United States Court of Appeals opinion is unreported as is the order denying rehearing. App. 1-4; App. 25; *Laura Esther Gonzalez-Hernandez, and Julian David Moncada-Gonzalez v. John Ashcroft, United States Attorney General*, No. 03-60435 (5th Cir. May 25, 2004) *petition for rehearing denied* July 20, 2004.

The Board of Immigration Appeals decisions are unreported. App. 5, 6; *In re Laura Esther R. Gonzalez-Hernandez*, A78 129 987 (BIA April 25, 2003) (unpublished); *In re Julian David Moncada-Gonzalez*, A78 129 988 (BIA April 25, 2003) (unpublished).

The Immigration Judge decision is unreported. App. 7-24; *Matter of Laura Esther Gonzalez Hernandez, and Julian David Moncada Gonzalez*, A78 129 987, A78 129 988 (Immigration Judge, Houston, Texas, July 16, 2001).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied petitioners' petition for review on May 25, 2004. App. 1. The United States Court of Appeals for the

Fifth Circuit denied the petitioners' request for rehearing on July 20, 2004. App. 25.

This Court has jurisdiction to review the final judgment of the Court of Appeals by writ of certiorari. 28 U.S.C. § 1254(1); *See also* 8 U.S.C. § 1252(a)(1), INA § 242(a)(1); 28 U.S.C. § 2350(a).

APPLICABLE LAW

The following statutes and regulations set forth the substantive law of asylum necessary for the Court's consideration of this case.

> **8 U.S.C. § 1101(a)(42)(A), INA § 101(a)(42)(A)**: The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion . . .

> **8 U.S.C. § 1158(b)(1), INA § 208(b)(1) Conditions for granting asylum**
> **In general**: The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) [INA § 101(a)(42)(A)] of this title.

8 U.S.C. § 1252(b)(4)(A), (B); INA § 242(b)(4)(A), (B):

Except as provided in paragraph (5)(B) –

(A) the court of appeals shall decide the petition on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) . . .

8 CFR §§ 208.13(a), 1208.13(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act [8 U.S.C. § 1101(a)(42)(A)]. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act [8 U.S.C. § 1225(b)(1)(B)] does not relieve the alien of the additional burden of establishing eligibility for asylum.

8 C.F.R. §§ 208.13(b), 1208.13(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

STATEMENT OF THE CASE

A. Jurisdiction Below

The United States Court of Appeals for the Fifth Circuit was the federal court of first instance in this case. App. 1. It had jurisdiction to review the Board of Immigration Appeal's April 25, 2003 final administrative removal order when the petitioner filed a timely petition for review on May 19, 2003. 8 U.S.C. § 1252(a)(1).

B. Credibility

Facts are not in dispute. The Immigration Judge found that the Petitioner, Laura Esther Gonzalez-Hernandez, was a credible witness and gave full evidentiary weight to her testimony. App. 18. Petitioner's testimony is summarized in her affidavit. App. 26-32. On appeal before the Fifth Circuit the government cited to this affidavit as accurately recounting the facts. *See, Respondent's Motion for Summary Denial of Review Petition In Lieu of Answering Brief*, at 1-3.

C. The Actors

Petitioner, Laura Esther Gonzalez-Hernandez, was born and owned a clothing factory in Colombia. App. 26, paragraphs 1, 5. She is mother to petitioner Julian David Moncada-Gonzalez, a minor. App. 26, paragraph 4. Petitioner has never belonged to any political party or been active in politics. Hearing Transcript, April 13, 2001, at 29. However she opposes non-governmental groups including paramilitary groups who derive their power not from legitimate elections but from illegal violence and terror. *Id* at 29-30; App. 27, paragraphs 7-8.

The Autodefensas Unidas de Colombia (hereinafter AUC) is a violent paramilitary group. The AUC threatens, kidnaps, tortures, and murders its perceived opponents and enemies. *See, e.g.* Record of Proceedings, Exhibit 5, Tab II-X, page 491 (noting tactics of mayhem, and decapitation). The AUC murders businesspersons who do not cooperate with them, and targets those who inform the police of its actions. *See*, Record of Proceedings: Exhibit 5, Tab IV-J, page 691; Exhibit 5, Tab IV-B, page 662. The AUC murders people who it believes hold views opposed to its own. Certified Administrative Record at 389, 428.

D. The Acts

In January 2000 two members of the AUC came to Petitioner's factory and asked her to make uniforms for her. She refused. She became very scared. The men from the AUC promised to return in a week. App. 26-27, paragraphs 6-8.

They did, and they became enraged when Petitioner again refused their order feigning inability and lack of time. One of the AUC men angrily accused that her refusal was pretextual. This man told Petitioner that he knew the truth, which was that she did not want to cooperate with the AUC. The AUC men's intense anger terrified Petitioner. When the AUC men left, the police arrested them outside the factory. App. 28, paragraphs 9-10.

The next day, an anonymous caller informed Petitioner that they knew she had informed the police and caused yesterday's arrests. The caller told Petitioner that the group was very angry with her and told her that she should not have turned her back on them. The anonymous caller threatened to kill Petitioner, her son (co-petitioner

Julian David Moncada-Gonzalez) and her mother. App. 28, paragraph 11.

This same day the local police asked to question Petitioner about what the AUC members had been doing at her factory before their arrest. App. 29, paragraph 12.

Early the next morning (Sunday), as Petitioner's mother and her aunt walked to Mass, alone on an empty street, a car drove by and quickly fired several bullets and was gone. The bullets entered and killed Petitioner's aunt. Petitioner is convinced that the AUC killed her aunt while trying to murder her mother. App. 29, paragraphs 13-14.

The next day, Petitioner, her son, and her mother fled to Armenia, Colombia. Petitioner had temporary police protection there but did not feel safe. The family then fled to Bogotá, Colombia still fearing for their lives. A short time later, Petitioner fled Colombia and found herself in the United States where these proceedings commenced. App. 30, paragraphs 15-17.

Petitioner believes that the AUC will harm her in Colombia because the AUC believes she opposes it. App. 32, paragraph 21.

E. The Adjudications

The Fifth Circuit decided that petitioner had not adduced direct or circumstantial evidence to show that the AUC possessed information which indicated that she held any particular political opinion. App. 2. It then decided that in the absence of a nexus to political opinion considering any additional agency error was fruitless. App. 3.

The Fifth Circuit denied rehearing without reasons. App. 25.

The Board of Immigration Appeals affirmed the Immigration Judge's decision without reasons. App. 5-6.

The Immigration Judge found that because the petitioner had told the AUC that she was too busy to help them instead of explaining her political position, and because she had no direct proof that it was the AUC who had threatened her and her family the day after her angry encounter with its members and their arrest, and who had killed her aunt the next day, that therefore she hadn't met her burden to show a nexus between the harm she suffered and her political opinion. App. 19-20, 22.

The Immigration Judge found that the threats and murder were harassment, but not persecution and that Petitioner had no well founded fear of persecution because of the brief period of police protection she had there. App. 21-22. The Immigration Judge found that the Petitioner could relocate in Colombia, citing to a seven year old State Department document. App. 22.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. Standard of Review

This Court has held that when reviewing probable cause and reasonable suspicion questions the appeals courts should use a bifurcated standard of review: clear error review for historical facts and *de novo* review for the legal conclusions drawn from those facts. *Ornelas v. United States*, 517 U.S. 690 (1996). "The first part of the

analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

Like the determination of probable cause, reviewing an application for asylum requires review of both historical facts, and of the legal implications of those facts – two distinct issues, which similarly should be reviewed under substantial evidence and *de novo* standards of review respectively. The Fifth Circuit Court of Appeals and the Second Circuit Court of Appeals conflict as to the application of mixed question of fact and law review in asylum cases.

The Second Circuit when historical facts in an asylum application are undisputed treats legal conclusions based on those facts as a mixed question of fact and law and reviews *de novo*. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2nd Cir. 2003) (reviewing credibility determination on undisputed facts de novo).

The Fifth Circuit reviews both historical facts and the application of law to facts only for substantial evidence. Only when the agency incorrectly states the law does the Fifth Circuit apply *de novo* review. *See, e.g. Mikhael v. INS*, 115 F.3d 299, 305 (5th Cir. 1997) (reversing an incorrect statement of law).

This Court should resolve the conflict between the circuit courts of appeals.

The question has become more important because the Department of Justice has curtailed administrative review of asylum claims. The Board of Immigration Appeals in 2002 implemented streamlining procedures that resulted in a marked increase in its affirming without opinion of complicated and non-frivolous asylum cases. *See*, App. 5-6; BIA Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (2002) (codified in part at 8 C.F.R. § 1003.2(e)).

The effect of that streamlining regulation has been to shift the burden of reviewing the Immigration Judge's decisions to the federal appeals courts. *See*, American Bar Association Commission on Immigration Policy, Practice and Pro Bono, *Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms* (October 2003).

Therefore beyond the conflict between the circuit courts the question is of systemic national importance and this Court should address it. Because of the streamlining regulation the appeals courts now often are the only source of any meaningful review of Immigration Judges' decision. Given their increased importance in deciding asylum questions this Court should issue clear guidance to the circuit courts.

If mixed question of law and fact review is appropriate then the Court should address whether government informant status is legally sufficient to establish political opinion. The Sixth Circuit has held that informant status and political opinion are mutually exclusive concepts. *Adhiyappa v. INS*, 58 F.3d 261, 267-68 (6th Cir. 1995)

(Informer for Sri Lankan government who feared retaliation was not being persecuted on account of his political opinion but rather because he was a government informant). The Fifth Circuit in petitioners' case essentially took the same view. App. 2.

However, the Ninth Circuit has held that being a government informant is a way to show political opinion. *Mejia v. Ashcroft*, 298 F.3d 873, 877-80 (9th Cir. 2002) (confidential informant is considered to have imputed political opinion).

As a normative matter it seems absurd to claim that being a government informant has as a matter of law nothing to do with one's political opinion and may not form the basis for a political opinion a persecutor imputes to an asylum applicant. However, just such absurd results will continue to be common in asylum adjudications if mixed questions of law and fact are beyond the scope of meaningful review in the courts of appeals as the Fifth Circuit treated them in this case.

B. Burden of Proof

This Court has held that an asylum applicant, to meet her burden of proof on whether she was persecuted on account of an imputed political opinion, must provide *some* evidence, direct or circumstantial, of the persecutor's motive. *INS v. Elias-Zacarias*, 502 U.S. 478, 483-4 (1992).

It isn't clear what exact quantum of proof that is. However this Court has held that because of their special nature asylum cases can be established on much less than a more likely than not or preponderance of the evidence standard. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430

(1987) (finding 1 in 10 possibility of harm sufficient to establish asylum eligibility under the well-founded fear standard).

Thus, the "some" evidence the asylum applicant must present should be more evidence than what would support a finding of probable cause but can be less than a preponderance. Anywhere within that range should satisfy the asylum applicant's burden of proof. Credible testimony suffices to meet the asylum applicant's burden of proof. 8 C.F.R. §§ 1208.13(a), 208.13(a).

This low burden of proof is commonsensical because an asylum applicant will not usually be able to adduce conclusive or direct evidence of her persecutor's motive. The appeals courts have recognized this problem as well and responded similarly. *See e.g., Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984) (noting that persecutors seldom "provide their victims with affidavits attesting to their acts of persecution").

This Court has held that because the burden of proof is crucial to the outcome of cases it is a substantive aspect of a claim. *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20-21 (2000) (citations omitted). Thus, the burden of proof is an essential element of the claim itself; and one who asserts a claim is entitled to the burden of proof that normally comes with it.

The standard for factual review of asylum cases in the courts of appeals is that any reasonable fact finder would be compelled to find the fact. 8 U.S.C. § 1252(b)(4)(B); INA § 242(b)(4)(B). It must, however, remain true that the reasonable fact finder on review need only be compelled to find that the quantum of evidence required below was

satisfied. This must be so since the low burden of proof is a substantive element of the asylum claim.

Thus, an appeals court reviewing a factual finding of a persecutor's motive need only be compelled to find that "some" evidence of the persecutor's motive was adduced, since "some" evidence was all that was required below. If such is *not* the law, then the practical effect is that a substantive element of the asylum claim – the burden of proof – changes with the filing of a petition for review.

That is unfair. That unfairness is compounded by the inability of the asylum applicant to present additional evidence to meet a heightened standard of proof in the appeals court.

The Court should address this issue because its decision in *Elias-Zacarias, supra*, left this point unclear. *Elias-Zacarias* did not address the issue of the burden of proof and how it interacts with the standard of review for factual issues in the courts of appeals.

The issue is of paramount importance in the hundreds of asylum cases filed daily in the federal courts of appeals. As currently applied the substantial evidence standard is sloppily applied and not logically consistent in asylum cases. When an appeals court reviews an asylum application for substantial evidence, without taking into account the underlying burden of proof, then the practical, incorrect, effect is that the alien's burden of proof has changed to her detriment by virtue of filing a petition for review in a circuit court.

This situation shows a subtle erosion of the principles of judicial review and a lack of logical, clear thinking in reviewing asylum cases that this Court should correct. If

the burden of proof is a substantive element of an asylum claim, then the review evidenced by the Fifth Circuit's decision in petitioners' case shows a disturbing implicit judicial rewriting of the substantive law of asylum.

Moreover, because the incorrect standard is unreasonably high, it makes judicial review of factual questions essentially meaningless in asylum cases. As noted above the shift of meaningful review of asylum cases from the Board of Immigration Appeals to the circuit courts makes the issue important for this Court to address. *See*, American Bar Association Commission on Immigration Policy, Practice and Pro Bono, *supra*.

The issue is even more important to the asylum applicant – every one, not merely petitioners at bar. Life, death, and great physical and emotional suffering are the central issues in this and in all asylum cases. The courts of appeals decide few other types of cases that routinely confront such dire issues. There should be absolute uniformity and clarity on the precise limits that bind a court of appeals when it reviews factual determinations by United States Department of Justice officials in asylum cases. This is so exactly because it is the most precious commodities – the life, death or freedom of human beings – which are at stake in these cases. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

C. Substantial Evidence

The policy of the Court is to generally not grant a writ of certiorari only to apply its limited resources to reviewing fact questions. However when the substantial evidence standard has been misapprehended or grossly misapplied this Court will grant certiorari to review. *See*

e.g., *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). In the case at bar, the Fifth Circuit Court of Appeals (and the agency) refused to credit probative circumstantial evidence, and made evidentiary demands that go beyond the substantive standard for asylum claims.

The facts here show that petitioner is a refugee and cry out for reversal. If the Court will review petitioners' case only for factual error, then it is difficult to imagine a more compelling case of imputed political opinion than the one petitioner presents. The morning after accusing petitioner of informing on it to the government, and threatening her family members the petitioner's family member is targeted (mother) and murdered (aunt). This is not a rational response to declining a clothing manufacturing contract – it must indicate a political motive.

The petitioner is a credible witness. App. 18, Immigration Judge decision. The agency has already determined that her testimony is to be believed. If the petitioner has not stated a claim for persecution on account of an imputed political opinion, then the regulation stating that credible testimony can meet an alien's burden of proof is meaningless. 8 C.F.R. §§ 208.13(a), 1208.13(a).

While a reversal of facts on this record will benefit petitioners, it will also guide the agency and the courts of appeals generally in correctly adjudicating these claims, it will be useful not only to the petitioners but to all the appeals courts in reviewing factual issues generally and particularly in reviewing asylum claims.

CONCLUSION

For all these reasons petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

JOSEPH A. VAIL, ESQ.
Associate Clinical Professor,
University of Houston Law Center
Immigration Clinic
100 Law Center, Room TUII 56
Houston, Texas 77204-6060
Telephone: 713-743-2094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60435 Summary Calendar

LAURA ESTHER GONZALEZ-HERNANDEZ;
JULIAN MONCADA-GONZALEZ,

Petitioners,

versus

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A78-129-987
BIA No. A78-129-988

(Filed May 25, 2004)

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Laura Esther Gonzalez-Hernandez and her minor son, Juliana Moncada, both natives of Colombia, have filed a petition for review of the decision of the Board of Immigration Appeals (BIA) affirming the Immigration Judge's (IJ)

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

denial of their petition for asylum, withholding of removal, and relief under the Convention Against Torture.

Gonzalez argues that the IJ employed the wrong legal standard and improperly weighed the evidence in determining that Gonzalez was not subject to persecution by the Autodefensas Unidas de Colombia (AUC) based on Gonzalez's political opinion.

Gonzalez was required to show that the persecutor's actions were motivated by Gonzalez's political opinion. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 350-51 (5th Cir. 2002). Gonzalez has not shown by direct or circumstantial evidence that the AUC possessed information which indicated that Gonzalez held any particular political opinion. The mere fact that the AUC believed that Gonzalez called the police to arrest some of their members was not sufficient evidence to show that the AUC believed that Gonzalez's call was politically motivated. Gonzalez did not provide any evidence that she had made a political position known to the AUC members at any time or other evidence to show that the AUC could have imputed a political opinion to her. *Cf. Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1998) (en banc) (an adverse political opinion was attributed by the army to the petitioner who was actively involved in a fiercely ideological dispute between the Philippine government and the army).

Gonzalez argues for the first time in her reply to the Government's motion for a summary dismissal that she was persecuted because she was a member of a particular social group consisting of all persons who oppose the AUC. This court will not consider issues raised for the first time in a reply brief. *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 260 n.9 (5th Cir. 1995). In any event, Gonzalez

has not shown that she was a member of a group of persons who shared a common characteristic that they either cannot change or should not be required to change because it is fundamental to their identities or consciences. *Ontunez-Tursios*, 303 F.3d at 352-53.

Gonzalez's remaining arguments concern the IJ's erroneous factfindings and misapplication of the correct standard of proof in determining whether she had been persecuted and whether it was more likely than not that she would suffer persecution if she returns to Colombia. Because Gonzalez has failed to show that any such persecution was the result of her political opinion or her participation in a political group, she has not shown that she was a refugee entitled to asylum. *See* 8 U.S.C. 1101(a)(42)(A). Thus, it is unnecessary to determine whether the IJ's determination that there was not a reasonable possibility that Gonzalez would be subject to persecution if she returns to Colombia was supported by substantial evidence.

To receive withholding of deportation, "the alien must demonstrate a clear probability of persecution on one of the enumerated grounds." *Jukic v. INS*, 40 F.3d 747, 749 (5th Cir. 1994). Since Gonzalez failed to show a clear probability of persecution based on her political opinion or her participation in a social group, she is not entitled to withholding of deportation.

Gonzalez has not argued in her brief that she is entitled to relief under the CAT. Therefore, this issue is abandoned. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

The petition for review is DENIED. Respondent Ashcroft's motion to summarily deny the petition is DENIED as moot. Respondent Ashcroft's motion to waive the

requirement to file a brief is GRANTED, and his motion to for an extension of time to file a brief is DENIED as unnecessary. Ashcroft's motion to file an out-of-time reply to the response is GRANTED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-129-987 – HOUSTON Date: Apr. 25, 2003

In re: GONZALEZ-HERNANDEZ, LAURA ESTHER (R)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Vail, Joseph A., Esquire

ON BEHALF OF SERVICE: Lisa Luis, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Edward R. Grant
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-129-988 – HOUSTON Date: Apr. 25, 2003

In re: MONCADA-GONZALEZ, JULIAN DAVID (R)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Lisa Luis, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Edward R. Grant
FOR THE BOARD

THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

FILE NO:	A78 129 987 A78 129 988	)
IN THE MATTER OF:		) **IN REMOVAL**
Laura Ester Gonzalez Hernandez Julian David Moncada Gonzalez		) **PROCEEDINGS**
Respondents		)

CHARGE: Section 212(a)(7)(A)(i) of the Immigration and Nationality Act – an alien who is not in possession of a valid unexpired immigrant visa, re-entry permit, border crossing identification card, or other valid entry document.

ON BEHALF OF RESPONDENT:

Joseph A. Vail, Esq.
University of Houston
Legal Aid Clinic
4800 Calhoun
Houston, Texas 77204-2094

ON BEHALF OF SERVICE:

Lisa Luis, Esq.
Assistant District Counsel
Houston, Texas

DECISION AND ORDER OF THE IMMIGRATION JUDGE

-Procedural History-

Respondent is a twenty-four-year-old female, native and citizen of Colombia. On March 9, 2000, the respondent and her five-year-old son[1] entered the United States by way of aircraft in Houston, Texas. Upon her arrival, the respondent stated that she wanted to seek asylum. She informed that [sic] officers that she attempted to seek asylum in Britain, but they sent her to the United States to seek asylum. Thus she was given a credible fear determination and the Service referred her case to the Immigration Court. On March 14, 2000, the Immigration and Naturalization Service ("Service") served the respondents with a Notice to Appear ("NTA") charging them under § 212(a)(7)(A)(i) of the Act.

On August 30, 2000, the respondent appeared for a master calendar hearing and admitted all allegations and conceded to the charge. The respondent submitted an application for asylum on November 8, 2000. On April 13, 2000, a merits hearing was held and the Court reserved its decision.

-Eligibility for Asylum-

An applicant for asylum must demonstrate by clear and convincing evidence that the application was filed within one year after the alien entered the United States. The applicant for asylum bears the evidentiary burdens of proof and persuasion in an application for

[1] The respondent is the lead respondent and her son is also a respondent and on her asylum application.

asylum under section 208 of the Act. *See* 8 C.F.R. § 208.13(a). The applicant must first demonstrate that he is a refugee as defined by section 101(a)(42)(A). An individual qualifies as a refugee if he is "unable or unwilling to return to, and is unable or unwilling to avail himself of the protection" of his home country or last habitual residence because of persecution, or a well-founded fear of future persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 101(a)(42)(A); *see also INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

The Board has defined persecution as the threat to the life or freedom of an individual, or the infliction of suffering or harm upon others due to a characteristic or belief that the oppressor seeks to overcome or punish in the victim. *See e.g.*, *Cardoza-Fonseca*, supra; *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). Persecution has not been found to encompass all treatment that society regards as unfair, unlawful, unjust or unconstitutional. *See Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997). Persecution is not limited to physical harm, but may include mental suffering or even economic deprivation so severe as to constitute a threat to an individual's life or freedom. *Id.* at 222. Prosecution for violating laws of general applicability does not constitute persecution, unless the punishment is grossly disproportionate to the proscribed conduct. *Id.* If the applicant's fear of persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded. *See* 8 C.F.R. 208.13(b)(1).

Past persecution alone satisfies the requirement of section 101(a)(42)(A) of the Act regardless of whether a

well-founded fear of persecution exists unless there is a fundamental change in circumstances in the alien's country or habitual residence, if stateless, since the persecution occurred, or the applicant could avoid future persecution by relocating to another part of the country. *See* 8 C.F.R. 208.13(b)(1)(i) and (ii); *see also Cardoza-Fonseca*, supra.

The requirement of a "well-founded fear" of future persecution has been clarified by the Board to mean that a reasonable person in the alien's circumstance would fear persecution if he was returned to a particular country based on one of the enumerated grounds. See 8 C.F.R. 208.13(b)(2)(i) (2001); *see also Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (embracing the decision of *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986)). In other words, the applicant's subjective fear of persecution must be objectively reasonable. *Jukic v. INS*, 40 F.3d 747, 749 (5th Cir. 1994).

Such persecution may come from the government or a non-governmental entity which the government is unwilling or unable to control. If the source of the persecution is a non-governmental entity, the applicant must demonstrate that the government is unwilling or unable to protect him. *See e.g.*, *Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975); *Matter of Tan*, 12 I&N Dec. 564 (BIA 1967).

It should also be noted that an alien who succeeds in establishing a well-founded fear of persecution or past persecution will not necessarily be granted asylum. He must also show that the persecution was or would be on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA

§ 101(a)(42)(A) *and* 8 C.F.R. 208.13(b)(2)(i) (2001). For instance, aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, or aliens desiring to experience greater economic opportunity or greater personal freedom or avoidance of military service would not qualify for asylum. Such persons may have well-founded fears, but such fears would not be on account of one of the specified grounds. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

Additionally, the applicant cannot establish well-founded fear of future persecution if he or she could avoid persecution by relocating to another part of the country. *See* 8 C.F.R. 208.13(b)(2)(ii) (2001).

The applicant is considered to be firmly resettled if prior to arrival in the United States, he or she entered another country and received permanent residence, citizenship or some other form of permanent resettlement. 8 C.F.R. § 208.15. Firm resettlement can be rebutted if the alien merely entered that country to arrange for onward travel, or if the conditions in that country were so substantially and consciously restricted by the authority of that country of refuge that the applicant was not in fact resettled. *See Id.*

Finally, the decision on an application for asylum ultimately is a matter of discretion. *See* INA § 101(a)(42)(A); *see also INS v. Cardoza-Fonseca*, supra. Therefore, even if an alien demonstrates eligibility for asylum, he must nonetheless show that his case merits a favorable exercise of discretion. *See id.*

In exercising discretion, it is appropriate to examine the totality of the circumstances and actions of an alien

in his flight from the country where persecution is feared. *Matter of Pula, supra.*

General humanitarian reasons, independent of the circumstances that led to the applicant's refugee status, such as his or her age, health, or family ties, should also be considered in the exercise of discretion. *See Matter of Pula, supra.* Although the totality of circumstances and actions of an alien in his or her flight from the country where persecution was suffered to the United States are to be considered, and may weigh against a favorable exercise of discretion, "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Id.* at 474.

-Eligibility for Withholding of Removal-

An asylum application shall be deemed to constitute at the same time an application for withholding of removal. *See* 8 C.F.R. § 208.3(b). Withholding of removal requires that an alien demonstrate that his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* INA § 241(b)(3)(A). Section 241(b)(3)(B) of the Act provides statutory bars to such relief. A court for instance, may deny withholding of removal if "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." *See* INA § 241(b)(3)(B)(ii). The relief of withholding of removal is mandatory, in that once an alien has established that he qualifies and is not barred under section 241(b)(3)(B) of the Act, the relief must be granted.

-Convention Against Torture-

The applicant will also be considered for withholding of removal under the Convention Against Torture. Pursuant to 8 C.F.R. § 208.16, to qualify for protection, an alien must establish that it is more likely than not that he will be tortured if returned to the country of removal. 8 C.F.R. §208.16. It is important to note that unlike the standard for asylum, evidence of past torture is not enough to establish eligibility for relief under the Convention. *See* 8 C.F.R. § 208.16(c)(3). In order for a certain treatment to qualify as torture an applicant must establish that: (1) it involves severe physical or mental pain or suffering; (2) is intentionally inflicted; and (3) is inflicted by a public official or other person acting in an official capacity, or with the knowledge of such of a person. *See* 8 C.F.R. § 208.18. An alien can meet the burden of proof through credible testimony without corroboration. *See* 8 C.F.R. § 208.16(c)(2). Pursuant to the regulations, an alien barred under section 208.16(d)(2) may still be granted deferral of removal if he meets the burden of proof for Convention Against Torture protection. *See* 8 C.F.R. § 208.17.

-Summary of Testimony-

Respondent was the only witness to testify. She informed the Court that she was from Palmira Valle, Colombia. She has a son, who is currently residing with her in the United States. Her mother and other siblings continue to reside in Colombia. She stated that she was not involved in politics, nor was she a member of any political parties or organizations.

She testified that she owned a clothing factory in Palmira Valle, Colombia for approximately two and a half

years before she fled Palmira Valle, Colombia. Respondent did not provide any documentation of ownership of the factory, other than a business card.

The respondent testified that on January 21, 2000, two men who identified themselves as members of the United Auto-Defense Groups of Colombia ("AUC") entered the factory and asked the respondent to make camouflaged uniforms for the AUC.[2] She denied the request because she had too much work. The men told her that they would return in a week, so she could reconsider. The respondent told her mother and other close employees about the incident. They all advised her not to get involved with the AUC. The respondent stated that according to her, AUC is a guerilla group and she did not want to be involved with them.[3]

The men returned as promised approximately a week later. Again, the respondent told these men that she would not make the camouflaged uniforms. They became angry, but left. After the men left, the watchman told the respondent that as the men were getting into their car, the police arrived and began searching these men. The police found weapons and other things. The respondent testified that she does not know how or why the police stopped these men at the factory. She had not called the police. She became very frightened.

---

[2] Department of State, Country Reports on Human Rights Practices for Colombia, 2000, stating that the AUC is a paramilitary group fighting against the guerilla groups.

[3] Department of State, the Colombian military collaborates with the AUC paramilitary group. There are orders by the Colombian government not to collaborate with the AUC, but the military continues to collaborate with the AUC paramilitary group.

On January 29, 2000, the respondent received a phone call at her factory. The person calling did not identify themselves, (s)he merely told her that since she called the police . . . [4] The person hung up the phone before the respondent could respond.

On that same day, the respondent received a summons from the police, stating that she would need to present herself to testify about the two men who were arrested coming out of her factory.

Later that evening on January 29, 2000, the respondent received another phone call. Again, the person did not identify themselves, but warned her that they were going to start killing her family, and mentioned her son and mother by name.

The respondent became terrified and did not know what to do, for she believed that the threats would be carried out. However, the respondent did not report the threats to the police that day.

On January 30, 2000, the respondent's aunt and mother were walking to church. They were approximately two blocks from the respondent's house, when respondent's mother came running into the respondent's home, saying that respondent's aunt had been shot. The respondent went out and noticed her aunt on the floor [sic]. The mother did not see who shot at the aunt, the mother stated that it all happened within seconds. Respondent's aunt had two bullet wounds. No one was present during the shooting, for it was 7:00 a.m.. The respondent stated that

---

[4] This statement in the respondent's testimony was not completed.

she believes the AUC are to blame for her aunt's death because of the threats the respondent received the previous day. The respondent felt that the threats were being honored and she feared for her life.

The respondent stated that the police arrived to pick up her aunt's body from the scene of the shooting, but she did not stay to speak with the police, nor did her mother. She stated that she needed to return to her house because of her son. The respondent did not report the murder of her aunt, or any other incidents to the police at this time.

The next day the respondent left Palmira Valle with her son and mother. They went to Armenia Quindio, Colombia. The respondent just left her factory without making arrangement to close the factory or to put someone else in charge. The respondent did not present herself as the police summons required and she did not call the police to notify them of her absence or of any of the incidents.

Upon her arrival in Armenia, the respondent went to the police and testified and made a declaration of the events that occurred in Palmira. The police gave her protection. They assigned one or two officers to watch over her day and night. Respondent believes that she would receive this protection until the police finished their investigation. However, the respondent still did not feel safe. She thought that a bomb would be planted and all would be killed. So after a week in Armenia, she left for Bogota, Colombia. The respondent remained in Bogota for approximately one month. During this time, the respondent did not have any problems or incidents with any organization or person(s). She did not ask for police protection.

The respondent made arrangements to fly from Bogota to Panama, then to Houston and on to London. Her final destination was Spain and she purchased a return ticket. She stated that she had no intention of going to Spain or returning to Colombia. She claimed the reason for the final destination was Spain and there was a return ticket was because that is the way the travel agent sold her the ticket.

The respondent stated that she did not feel safe in Bogota and thought that she could go to London, where she had a friend and cousin. The respondent's mother stayed in Bogota due to financial restraints, but planned to meet up with the respondent once she was settled in London. Once the respondent arrived in London, she asked for political asylum, but the authorities told her that she could not because she had stopped in Houston, Texas first. The British authorities did not ask her any substantive questions about her claim. They merely returned her to Houston, Texas.

The respondent was asked why she did not seek political asylum in Panama and she stated that Panama was too close to Colombia.

The respondent's mother is in Bogota, where she owns a house, but the house is rented out. So, the mother is staying with friends. Respondent states she stays in contact with her mother by phone. She calls her every twenty days. The mother once reported to respondent that in August of 2000 she received telephone calls from people. But respondent's mother would not go into detail about the calls. *See* Exhibit 3, Tab II G and Tab II H.

In December 2000, respondent's mother's renter received calls, the caller identified themselves as immigration

and that respondent's had an approved visa. The renter asked the caller to leave her name and number. The caller left the name of Lilliana Gonzalez, but did not leave a phone number. The respondent stated that she did not and has not requested a visa from the United States government. Other than these incidents, respondent's family members have not had any problems or incidents in Colombia.

-Credibility-

Before determining whether Respondent meets the statutory criteria required for asylum, the Court will address the credibility of Respondent's testimony. An alien's own credible testimony if plausible in light of general conditions in his country of nationality, may be sufficient to sustain the alien's burden of proof in establishing past persecution or a well-founded fear of future persecution. *See Matter of H-,* Int. Dec. 3276 (BIA 1996), *relying on Matter of Mogharrabi*, supra. It is the duty of the Immigration Judge to determine whether or not the alien is credible. *See Vasquez-Mondragon v. INS,* 560 F.2d 1225, 1226 (5th Cir. 1977).

During these proceedings, Respondent testified. The Court carefully listened to the Respondent's testimony and observed his [sic] demeanor. The respondent testified in a consistent manner. Her testimony will be given full evidentiary weight.

-Analysis-

The respondent is an arriving alien, who immediately upon arrival told the customs officer she was seeking

asylum. She did meet the one year requirement of applying within one year of arriving in the United States. *See* INA § 208(a)(2)(B).

The respondent refuses to return to her native country of Colombia because she fears she will be harmed. She claims this harm is directed to her from the AUC based upon her direct and imputed political opinion and her membership in a particular social group.

According to the respondent's testimony she was asked by the AUC to make camouflaged uniforms for their organization. She refused due to her voluminous work load. She did not state that the reason for her refusal was because she did not support the AUC's causes. Thus, the AUC did not know nor did they have reason to believe that her unsupportive stance toward the AUC was one of the reasons for her refusal to accept the order.

The respondent also speculates that the AUC believes she called the police and had them arrested while walking out of her factory on a second occasion. As stated in her testimony the AUC returned a week after their first visit for the respondent to reconsider their offer. Upon their second visit was when the men identifying themselves as members of the AUC were arrested. The respondent thinks that the AUC believes she reported them to the police because the police arrested these men outside of her factory.

The next day the respondent received two phone calls from a person with a male voice, who did not identify himself. The person calling made threats of harming and killing her mother and son. The respondent believes that the phone calls were made by the AUC. However, she only speculates that the AUC made these calls, she has no

proof and they did not identify themselves. She believes that the AUC made these calls because two of their men were arrested outside respondent's factory after their second visit with her.

The next day in the early morning hours, the respondent's mother and aunt were walking to church when the respondent's aunt was shot. She suffered two bullet wounds. The only witness to the shooting was respondent's mother. The respondent's mother told the respondent that she did not know who shot the respondent's aunt because it all happened so quickly. However, because of the threatening phone calls that the respondent received the previous day, she thinks the AUC are responsible for her aunt's death and are honoring their threats.

The respondent was distraught and scared and decided to take her son and mother to Armenia Quindio, Colombia, the next day. Prior to her leaving Palmira Valle, she did not talk to or report any incidents to the police. She hastily left Palmira Valle. She did not even make arrangements for closing or the handling of her factory. Once in Armenia, she reported to the police to denounce the AUC and the incidents that occurred within the last few days.

The police took down her testimony and gave the respondent full day and night police guard protection. While she was under police protection, the respondent was not harmed or bothered. However, after a week, the respondent decided to leave the safety of the police protection in Armenia, and go to Bogota.

In Bogota, she did not seek out police protection, nor did she report to the Bogota police what had occurred in Palmira Valle. She stayed in Bogota for about a month,

without incident or problems. Then she decided to leave Colombia and fly to London to ask for asylum. En route to London, she stopped in Panama for a couple of days, had a layover in Houston and then arrived in London. In London, the immigration authorities told her that she had a third country to seek protection, the United States and they returned her to Houston. Throughout her travels to London, she did not seek asylum.

The respondent has not suffered past persecution, but she has endured harassment. But the harassment, even in the aggregate, is not so egregious as to rise to the level of persecution.

Most importantly, when she finally did seek police protection, the Colombian government provided her with a day and night police guard. During the time she was receiving police protection, nothing happened to her. However, she decided to leave that protection and go off to Bogota. In Bogota, she did not feel the need for police protection, so she did not ask for any protection. During her month in Bogota, she did not endure any incident or problems.

The respondent does not have well-founded fear of future persecution. She fears returning to return to Colombia. However, objectively, she does not have a well-founded fear. Her mother continues to receive phone calls. However, the consistency, the contents or severity of the calls are unknown. Her mother and other siblings continue to live in Colombia without incident, besides the calls. She lived in Bogota for a month without incident. If there were a problem, she would be able to receive police protection. That was proven when she was in Armenia, she was given

night and day police protection. The Colombian government is able and willing to protect the respondent.

The respondent has shown that she is able to relocate to another part of Colombia and live without incident.[5] If there is incident, she can rely on the government to protect her.

The respondent has not proven that she has suffered past persecution or has a well-founded fear of future persecution based upon her political opinion (direct or imputed) or being a member of a particular social group. The AUC did not have reason to believe she did not believe or support their cause, nor did they care. The AUC only wanted the respondent to make their uniforms. If the AUC did harass the respondent, they did not do so on behalf of her political opinion (direct or imputed). But again, the respondent does not know that the AUC made the threats or carried out one of the threats. The respondent was not harassed because she was a factory owner that produced men and children clothing. The respondent has not provided proof that others similarly situated have endured similar circumstances. The respondent speculates that the AUC thinks she is a police informer. Notwithstanding the possibility of the AUC's perception of the respondent as a police informer, the respondent was able to receive police protection and continues to be able to receive such protection and is able to relocate to another area of Colombia.

---

[5] Department of State, Profile on Asylum Claims and Country Conditions for Colombia, June 1997, attesting that relocation in other parts of Colombia is viable for those people who have had run-ins with the guerillas and/or the government.

The respondent has endured harassment in Palmira. But, she has lived in other parts of Colombia without any problems. The government is able and willing to protect her, as shown in Armenia, where she was given day and night police protection. She lived in Bogota without problems, as does her family at this time. She has not established that she is a refugee as defined under the United States immigration laws.

In evaluating the totality of the circumstances, it appears that the respondent is able to protected by the Colombian government and the government is willing to do so. Additionally, the respondent has shown the possibility of being able to relocate to another part of Colombia without any problems arising. The respondent's claim for asylum will be denied.

The respondent has not satisfied the elements for asylum and thus, has not established the elements for withholding of removal. Therefore, the respondent's claim for withholding of removal must be denied.

Under the Convention Against Torture ("CAT") claim, the respondent must prove that she will more likely than not be tortured if returned to her native country. The respondent has not established her burden of proof. She has not proved that she will more likely than not suffer severe physical or mental pain or suffering that was intentionally inflicted by a government official or that the government knew of such intentional infliction of such severe pain or suffering. She has proven that she possibly will suffer some pain or suffering, but not severe. This suffering will probably be intentional, but not at the hands of the government or that the government knew and did nothing. On the contrary, the government will and is able

to provide protection to the respondent. Therefore, her CAT claim must be denied.

The respondents are arriving aliens and therefore, are not eligible for voluntary departure. Respondents' voluntary departure application must be denied.

Accordingly,

ORDERS

IT IS HEREBY ORDERED that Respondents' Application for Political Asylum be DENIED.

IT IS FURTHER ORDERED that Respondents' Application for Withholding or [sic] Removal be DENIED.

IT IS FURTHER ORDERED that Respondents' Application for Convention Against Torture be DENIED.

IT IS FURTHER ORDERED that Respondents' application for VOLUNTARY DEPARTURE be DENIED.

The Respondents are ORDERED deported [sic] from the United States to COLOMBIA on the charge contained in the NOTICE TO APPEAR.

7/16/01
Date

/s/ Clarease Rankin Yates
Clarease Rankin Yates
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60435

LAURA ESTHER GONZALEZ-HERNANDEZ; JULIAN MONCADA-GONZALEZ

Petitioners

v.

JOHN ASHCROFT, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING

(Filed Jul. 20, 2004)

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

STATE OF TEXAS)
)
COUNTY OF HARRIS)

Affidavit of Laura Gonzalez Hernandez

1) I, Laura Gonzalez Hernandez, state that the following is a true and accurate account:

2) I was born on May 5, 1977, in the town of Palmira, in the Valle de Cauca department of Colombia.

3) I came to the United States on March 9, 2000 because I was in fear for my life and my son's life in Colombia. I had been threatened by the Autodefensas Unidas de Colombia group that exists throughout the country. They even killed my aunt mistaking her for my mother. This fear is why I was forced to flee to the United States.

4) I lived in a small town named Palmira, Valle, Colombia. It is near Cali, which is a very large city. I had grown up there and my mother continued living there with me. My parents are divorced and I do not have a close relationship with my father. I have one son, Julian David Moncada Gonzalea. He is five years old.

5) I founded and managed a small clothing factory in Palmira, Valle, Colombia. The name of it was "Confecciones Laura." We made all types of clothes, but, specialized in men's and children's clothing. We had just started a new line of work clothes. We had 30 employees. Until recently, we had never had any trouble with anyone. The factory had been working for about two years and was very successful. The income from the factory supported my family.

6) On Friday morning, January 21, 2000, two men came into my factory. The guard outside saw them and told them to enter and they asked to talk to me – Doña

Laura Esther. My guard informed me of their presence and I immediately let them into my office. The two men sat down and I started to talk with them.

7) They said that they were members of the Autodefensas Unidas de Colombia. This is the largest anti-government paramilitary groups in Colombia. I consider both the paramilitaries and the guerrillas to be like rebel groups because neither group is controlled by the government. Both groups are terrible and are ruining the country. Both groups are not like the government because they get their power from violence, not through elections. The men said that they wanted me to make 500 camouflage uniforms for them. They said that they would pay me, but I was scared because I did not know these people. I did not want problems with them. I told them that I was not a member in their group. I answered them saying that I did not want to get mixed up with any sort of problems. I knew that if I made uniforms for the group, the group would tell the authorities that I was helping them (the paramilitaries), and the police and authorities of the city would shut my factory down and complicate the lives of me and my family. The men were upset and told me that they would come back in a week to see if I had changed my mind. They told me not to tell anybody and that it would be very bad if I did. I was very scared.

8) I told my mother, Amanda Hernandez Roldan, and a few trusted employee about this incident. All of them recommended that I should be careful. They thought that I would be getting involved with serious problems. They all agreed that I should not do business for any reason with those people in the Autodefensas. I did not want to help the Autodefensas, or any guerrilla-like group, because these groups are not a legitimate force in the country and they take their power by force, including kidnappings and killings. If

asked, I would only help the government itself because it is a legitimate organization elected by the people.

9) A week later on Friday, January 28, 2000, the same two men came back to my factory. They had wanted to know if I would work with them and make their uniforms; again, I refused. I was not with their group; so, I told them that I was busy with a lot of contracts to finish and that I would only disappoint them. I was trying to not make them upset with me but I just wanted them to leave me alone. Immediately, the two men became furious. One of them told me that he knew the truth, and that I just did not want to cooperate with them. I was terrified because the men had treated me so badly.

10) They left the office very angry with me and I did not know what to expect. Then the two men immediately got in their car outside my factory and left. A driver had been waiting in the car for them. When they got in the car, the police patrol drove up and quickly surrounded them. A few policemen got out of their cars and they made the Autodefensas members get out of their car. When the police searched them, they found weapons and other things that I could not identify. Immediately, the police took the two men into custody.

11) In the early morning hours of Saturday, January 29th, 2000, one of the men in the Autodefensas group called me at the factory. My secretary answered the phone and passed the call on to me. The man on the phone told me that they knew that I had informed the police on them. He said that the police would not always be there to help me. He also said that their group was very angry and that I should not have turned my back on them. (I was never with their group though.) He then said that there were many people in their organization and that I could not escape them. He said that I would have to wait to find

out what was going to happen to me. He said that I could expect to die at any time. The man said that he would kill my son, Julian David, and then my mother, Amanda Hernandez Roldan, and afterwards kill me. The man hung up the phone before I had a chance to respond. The man on the phone knew the names of my family members! This frightened me. I was terrified.

12) Later that same day, on Saturday, January 29, 2000, the police sent me a summons to give my testimony. They wanted information on the Autodefensas and what had gone on in my factory. We scheduled a time to give my testimony, but, I left Palmira before I was able to talk to the police there. I was too afraid to stay in Palmira because I thought the paramilitary men would come after me.

13) The next day, on Sunday, January 30, 2000, at 7:30 a.m., my aunt, Amparo Hernandez Roldan, was walking to Catholic mass with my mother from their house. The distance was only two blocks. Suddenly, shots were fired at my aunt and my mother. My mother fell on the ground but was not badly injured. However, my aunt was shot and died as a result of the wounds she received. Two bullets were found in her body. My mother said it all happened so quickly that she could not tell how many people were shooting, what they looked like, or how many shots were fired altogether. She only saw a car drive away after the shooting. It was so early in the morning that no one was out in the street to see what happened.

14) I am certain that it was the Autodefensas paramilitary group that gunned down my aunt and killed her in the street. At the time, I was at home with my son, Julian David. I believe they think that my aunt was my mother and shot her by mistake. I feel a deep sense of guilt because the bullet was intended for me, but it killed my aunt. I believe that they were following

through with their threat to kill my family in order to hurt me because of my refusal to assist them. They were following through with what they had threatened against me on the phone the day before.

15) We were terrified for our lives; so, my mother, my son, and I left the next morning (January, 31, 2000). I closed my factory and we went to Armenia, which is another state in Colombia. It was about a three-hour trip by car. We spent one week in Armenia. I gave my sworn testimony to the police there. The police said that they could offer me security while I was giving my testimony. I had a police bodyguard stay with me all the time while I was giving my statement and staying in Armenia. Once my testimony was finished, the police said they could not offer me any more protection.

16) Then, all three of us left for Bogota. We thought that in a large city we would not be found by the Autodefensas. However, I was still scared for our lives there. I did not feel safe even in Bogota. We stayed in Bogota for almost a month with some of my relatives, but, since we still felt in danger for our lives. I thought that I might have to leave Colombia, so, we obtained permission for Julian David to leave the country with me from his birth-father.

17) I was scared and did not think that I could go anywhere in Colombia and be safe. I could not go out in public and feel like I was safe. I have a distant cousin who lives in London; so, I thought that I might be able to move there with my son for our safety. We did not have enough money to take my mother with us. We thought that she could leave Colombia once I had established myself in another country. So, we bought two tickets for London and on March 7, 2000, my son and I left for London. We stopped first in Panama City, Panama, then in Houston, Texas, and then flew on to London. The immigration office at the London

airport turned us around and made us come back to Houston. Once back in Houston, I refused to go back to Colombia. I thought for sure the Autodefensas would know where we were by now because of the police testimony that I gave. My son and I stayed in Houston.

18) I have talked to my mother by telephone about every 20 days since I have been in the United States. She lives in Bogota with a friend. Unfortunately, there is no telephone where she is living. Another friend of hers lives nearby and allows me to call my mother there. My mother and I agree on when she can come to the friend's house to receive my calls. My mother tells me that she is still afraid because of everything that has happened. She tells me that it was her fault that her sister, my aunt, died. She feels guilty for what the Autodefensas did.

19) In December 2000, I called the lady who was renting the house in Bogota that my mother owns. I wanted to wish her a Merry Christmas. She told me that someone, a woman, had been calling the house asking where Laura Gonzalez was. The woman identified herself as an official of the U.S. Immigration department. In one of the calls, the woman said she was asking for me because my visa had been approved. I have not applied for an U.S. visa at this time. The person would not leave her name or phone number. The woman called about three times between December 2000 and January 2001. The lady renting the house told the woman the she did not know where I was. I felt nervous that the Autodefensas knew who to call to ask for me.

20) More or less at the beginning of March 2001, I called the lady again. She said no one had called back. Later, in mid-March, I called the lady and no one answered. To me, this means that the lady did not want to be in the middle of a conflict between me and the Autodefensa. She was probably scared. I found out

from my mother (over the phone) that the lady had left the house and was no longer living there or paying the rent. Since then, no one is living in the house. My mother has not seen the lady in awhile.

21) For all of these reasons, I do not believe that I can ever go back to Colombia. I have already been persecuted by this group and I believe that I will be persecuted by the Autodefensas Unidas de Colombia if I were to return because they think that I am against them.

/s/ Laura Gonzalez Hernandez
Laura Gonzalez Hernandez
3/29/01

TRANSLATOR'S CERTIFICATION

I, Angelique Montano, certify that I am proficient in English and Spanish and that the foregoing Respondent's Amended Statement of March 29, 2001, is an accurate and true statement of Respondent's oral statement made in Spanish. I read words written in English to the Respondent back in Spanish.

/s/ Angelique Montano
ANEGLIQUE MONTANO
Student Representative
Legal Aid Clinic
University of Houston
Law Center
4800 Calhoun
Houston, Texas 77204-6380
(713) 743-2094
(713) 743-2195 (FAX)